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The Honorable Frederick P. Corbit
Chapter 11

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21 UNITED STATES BANKRUPTCY COURT
22 EASTERN DISTRICT OF WASHINGTON

23 In re:

24 REFRESHING USA, LLC¹,
25 Debtor.

26 Lead Case No. 24-01863 (FPC)
Jointly Administered

INITIAL OBJECTION TO
POTENTIAL ASSUMPTION OF
EXECUTORY CONTRACT

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¹ Debtors and debtors-in-possession in these Chapter 11 cases ("Bankruptcy Case(s)"), along with the last four digits of their respective Employer Identification Numbers, are as follows: Refreshing USA, LLC (85-3358945) ("Refreshing"), Case No. 24-01863-11; Water Station Management LLC (81-1202716) ("Water Station"), Case No. 24-01864-11; and Creative Technologies, LLC (46-2581888) ("Creative" and, together with Refreshing and Water Station, "Debtors"), Case No. 24-01866-11. Debtors' mailing address is: 2732 Grand Ave., Ste. 122, Everett, WA 98201.

INITIAL OBJECTION TO POTENTIAL ASSUMPTION OF EXECUTORY CONTRACT - 1

1 Unsecured Creditor and contract counter-party Raley's Arizona LLC (d/b/a
2 Bashas')("Bashas'") hereby submits its Initial Objection to Potential Assumption
3 of Executory Contract (the "Objection"). In support of the Objection, Bashas'
4 respectfully states as follows:

5 1. On or around February 8, 2024, Bashas' entered into that certain
6 Water Station Location Agreement, dated as of February 12, 2024 (the
7 "Agreement"), with Debtor Water Station Management, LLC (the "Debtor"). A
8 true and correct copy of the Agreement is attached as **Exhibit A** to the Declaration
9 of Greg Ashley ("Ashley Decl.") submitted herewith. Bashas' understands that
10 the Agreement is among the executory contracts² that the Debtor may seek to
11 assign in connection with its proposed sale of assets in this bankruptcy proceeding.

12 2. The Agreement provides that the Debtor is the "owner of and has the
13 obligation and authority to install" water dispensing machines (the "Water
14 Machines") at approximately 90 grocery stores operated by Bashas' in the states of
15 Arizona and New Mexico. Ashley Decl. ¶ 3, Ex. A, p. 1, para. 1. The Debtor
16 agreed to pay a "commission" to Bashas' amounting to 57.5% of the revenue
17 received by the Debtor from the operation of the Water Machines at the Bashas'
18 grocery store locations. Ashley Decl., Ex. A, p. 2, para. 10. The Agreement also
19 provides that the Debtor will "issue a monthly statement" to Bashas' stating the
20 commissions due and owing to Bashas' "from the previous month no later than
21 five (5) calendar days after the end of such previous month." Ashley Decl., Ex. A,
22 p. 2, para. 11

23 3. The Agreement further provides that the Debtor "agrees to service,
24 operate and maintain" the Water Machines "in a first-class manner and in full
25

26 ² Because the Debtor did not list the Agreement on its Schedule G, Bashas' cannot ascertain whether the Debtor
even understands it to be an executory contract that is capable of assignment.

1 compliance with all health and safety regulations of governmental authorities
2 pertaining to water quality.” Ashley Decl., Ex. A, p. 3. para. 15.

3 4. The Agreement also requires the Debtor to provide evidence to
4 Bashas’ of the Debtor’s commercial general liability insurance policy, which must
5 have combined single limit coverage of \$2,000,000 and \$4,000,000 aggregate
6 coverage for bodily injury, death and/or property damage, with Bashas’ named as
7 an additional insured. Ashley Decl. ¶ 3, Ex. A, p. 2. para. 13. The Agreement
8 further states that the Debtor “shall, at its own cost and expense, indemnify, defend
9 and hold harmless” Bashas’ from any claims or lawsuits arising out of or otherwise
10 connected with the business activities of the Debtor. Ashley Decl. ¶ 3, Ex. A, p. 2-
11 3. para. 14.

12 5. The Debtor has failed to abide by many of the material covenants in
13 the Agreement. Specifically, the Debtor has failed to (a) send a single monthly
14 statement to Bashas’ that complies with the terms of the Agreement³, (b) issue a
15 single monthly payment to Bashas’ and (c) provide Bashas’ with certificates of
16 insurance indicating that the Debtor has obtained the required insurance coverage
17 and has named Bashas’ as an additional insured. Ashley Decl. ¶ 4. The Debtor has
18 also failed to adequately maintain the Water Machines and failed to ensure that
19 they are all properly licensed for operation at all times. Bashas’ is aware of at least
20 10 separate instances where a Water Machine placed at a Bashas’ location has been
21 “blue-tagged” or “red-tagged” by the Arizona Department of Agriculture Weights
22 and Measures Services Division for, among other things, having been operated by
23 the Debtor without proper licensure, which means that such Water Machines are
24 deemed inoperable until the issues are addressed. Ashley Decl. ¶ 4.

25
26 ³ Rather, the Debtor has sent only an Excel spreadsheet that purports to serve as a “commission grid” and states the Debtor’s grossly inaccurate calculations of the commissions due to Bashas’.

1 6. Bashas’ is also aware of another instance where a Water Machine that
2 the Debtor had failed to maintain at a Bashas’ location leaked substantial quantities
3 of water onto the ground around it, creating a “black ice” condition when the water
4 froze, which likely contributed to an alleged “slip and fall” incident involving a
5 Bashas’ customer. Because the Debtor has failed to provide Bashas’ any
6 certificate of insurance, Bashas’ is concerned that the Debtor may not have
7 obtained the required insurance and that the Debtor, which is now insolvent, will
8 have no ability to indemnify Bashas’ for any liabilities or lawsuits that may arise
9 from this incident. Ashley Decl. ¶ 5.

10 7. Due to the Debtor’s egregious breaches of the Agreement, Bashas’
11 delivered a Notice of Termination of the Agreement to the Debtor on October 24,
12 2024. Ashley Decl. ¶ 6, Ex. B. Bashas’ was unaware of the Debtor’s bankruptcy
13 proceeding at that time, since the Debtor did not provide notice of such bankruptcy
14 proceeding to Bashas’ until the Debtor’s counsel served Bashas’ with the Amended
15 Notice of Chapter 11 Bankruptcy Cases on or around January 2, 2025, which was
16 received by Bashas’ on or around January 7, 2025. Ashley Decl. ¶ 6.

17 8. Because many of Bashas’ grocery store locations serve as the sole or
18 limited source of groceries and clean water for tribal lands in Arizona and New
19 Mexico, Bashas’ had no choice but to remove and replace the Water Machines
20 with water dispensing machines that were operated and maintained by a reliable
21 vendor. Ashley Decl. ¶ 7.

22 9. As a result of the fact that the Debtor’s non-monetary defaults under
23 the Agreement are material and incapable of being cured, the Agreement cannot be
24 assumed or assigned pursuant to 11 U.S.C. § 365. “A default precludes
25 assumption of an executory contract under § 365 if it is both incurable and
26 ‘material in the sense that it goes to the essence of the contract, i.e. the bargained

1 for exchange.”” *In re Empire Equities Capital Corp.*, 405 B.R. 687, 691 (Bankr.
2 S.D.N.Y. 2009)(quoting *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1092 (3d Cir.
3 1990).)

4 10. In addition, as a result of the Debtor’s complete and utter failure to
5 perform its obligations under the Agreement, Bashas’ has reason to believe that it
6 may have been fraudulently induced to enter into the Agreement by the Debtor and
7 Bashas’ therefore reserves the right to seek rescission of the Agreement in an
8 adversary proceeding or other lawsuit should it become necessary to do so.

9 For the foregoing reasons, Bashas’ objects to the assumption and assignment
10 of the Agreement and respectfully requests this Court provide Bashas’ with such
11 other and further relief as this Court may deem just and appropriate.

12 DATED: January 24, 2025. STOEL RIVES LLP

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DATED: January 24, 2025.

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